
Volume 102

Issue 5 *Issue 5, A Tribute to Thomas E. McHugh: An Encyclopedia of Legal Principles From His Opinions as a Justice of the West Virginia Supreme Court of Appeals*

Article 20

June 2002

Administrative Law

Robin Jean Davis

West Virginia Supreme Court of Appeals

Louis J. Palmer Jr.

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Administrative Law Commons](#)

Recommended Citation

Robin J. Davis & Louis J. Palmer Jr., *Administrative Law*, 102 W. Va. L. Rev. (2002).

Available at: <https://researchrepository.wvu.edu/wvlr/vol102/iss5/20>

This A Tribute to Thomas E. McHugh: An Encyclopedia of Legal Principles From His Opinions as a Justice of the West Virginia Supreme Court of Appeals is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

Justice McHugh wrote in *Clark v. Kawasaki Motors Corp., U.S.A.*¹⁰³¹ that

[i]n reducing a jury verdict in a negligence action by the amount of the plaintiff's prior settlement with a joint tortfeasor, in light of the percentage of the plaintiff's comparative negligence later found by the jury at trial, this Court adopts the "settlement first," rather than the "fault first" method; under the "settlement first" method, the trial court in making the reduction first credits the amount of the prior settlement against the jury verdict, and then reduces the remainder by the percentage of the plaintiff's comparative negligence; whereas, under the "fault first" method, the trial court in making the reduction first reduces the jury verdict by the percentage of the plaintiff's negligence, and then credits against the remainder the amount of the prior settlement.¹⁰³²

Justice McHugh held in *Andrews v. Reynolds Memorial Hospital, Inc.*¹⁰³³ that

[a] jury award for the lost future earnings of an infant, in a negligence action alleging that the infant's death resulted from medical malpractice committed with regard to the mother's labor and delivery of the child, will not be set aside by this Court as speculative: (1) where the award of lost future earnings is within the range of estimated future earnings, based upon various life scenarios, reduced to present value, established by the expert testimony of an economist at trial and (2) where the economic and medical evidence of the plaintiff at trial indicates that the infant in question, though born prematurely, would statistically have had an average life expectancy and an average work life expectancy, but for the alleged medical malpractice.¹⁰³⁴

XVI. ADMINISTRATIVE LAW

A. *State Civil Service Commission*

Justice McHugh struck a balance between technical error and substantial compliance with administrative procedural rules in *Vosberg v. Civil Service Commission of West Virginia*.¹⁰³⁵ It was held:

¹⁰³¹ 490 S.E.2d 852 (W. Va. 1997).

¹⁰³² *Id.* at Syl. Pt. 3.

¹⁰³³ 499 S.E.2d 846 (W. Va. 1997).

¹⁰³⁴ *Id.* at Syl. Pt. 2.

¹⁰³⁵ 275 S.E.2d 640 (W. Va. 1981).

Where a state employee, covered by civil service *W.Va. Code*, ch. 29, art. 6, has instituted a grievance pursuant to a state personnel grievance procedure and the employee's supervisor violates the grievance procedure, such violation will not result in the reversal of an order by the West Virginia Civil Service Commission affirming the employee's dismissal from employment, where such violation of the grievance procedure is merely technical, following substantial compliance with the procedure, and there has existed between the employee and his supervisors ongoing communications concerning the employee's employment problems.¹⁰³⁶

Justice McHugh held in *State ex rel. Ginsberg v. West Virginia Civil Service Commission*¹⁰³⁷ that "[a] classified civil service employee who is suspended from his employment for thirty days or less is not entitled to an appeal to the West Virginia Civil Service System."¹⁰³⁸

Relying upon the opinion in *Caldwell v. Civil Service Commission*,¹⁰³⁹ Justice McHugh held in *West Virginia Department of Health v. Mathison*¹⁰⁴⁰ that

[t]he abolition of a position, covered by the Civil Service System, pursuant to the reorganization of a unit of state government is proper when it is shown to have been made to meet changing needs or to promote efficiency in government and has been approved by the Civil Service System.¹⁰⁴¹

In *Barnes v. Public Service Commission*,¹⁰⁴² Justice McHugh held that "*W.Va. Code*, 29-6-15 (1977) authorizes the Civil Service Commission to award attorney fees to a civil service employee as a remedy where the action taken by the appointing authority was too severe but was with good cause."¹⁰⁴³

Justice McHugh stated in *American Federation of State, County & Municipal Employees v. Civil Service Commission of West Virginia*¹⁰⁴⁴ that

[w]here employees of the Department of Human Services of West

¹⁰³⁶ *Id.* at Syl. Pt. 1.

¹⁰³⁷ 294 S.E.2d 140 (W. Va. 1982).

¹⁰³⁸ *Id.* at Syl.

¹⁰³⁹ 184 S.E.2d 625 (W. Va. 1971).

¹⁰⁴⁰ 301 S.E.2d 783 (W. Va. 1983).

¹⁰⁴¹ *Id.* at Syl. Pt. 1.

¹⁰⁴² 304 S.E.2d 685 (W. Va. 1983).

¹⁰⁴³ *Id.* at Syl.

¹⁰⁴⁴ 324 S.E.2d 363 (W. Va. 1984).

Virginia were classified for purposes of civil service as Economic Service Worker I or II, and the work performed by those employees was not distinguished by the Department of Human Services from the work performed by an Economic Service Worker III (a higher salaried position), such employees were entitled to the difference in compensation between their Economic Service Worker I or II classifications and the Economic Service Worker III classification.¹⁰⁴⁵

B. Health Care Peer Review Organization

Justice McHugh addressed several issues concerning health care peer review organizations in *Garrison v. Herbert J. Thomas Memorial Hospital Ass'n*.¹⁰⁴⁶ The court initially held that

[u]nder *W.Va. Code*, 30-3C-2(a) [1980], individuals providing information to any review organization may not be shielded from civil liability when they provide information that is: (1) unrelated to the performance of the duties and functions of such review organization; and (2) false, and the person providing such information knew, or had reason to believe, that such information was false. Thus, individuals conducting health care peer review must act in good faith in order to be statutorily immunized from civil liability under *W.Va. Code*, 30-3C-2 [1980].¹⁰⁴⁷

The court in *Garrison* held next that

[t]he public policy in favor of full disclosure encourages individuals to provide “good-faith health care peer review.” *Mahmoodian v. United Hospital Center, Inc.*, 185 W.Va. 59, 65, 404 S.E.2d 750, 756, cert. denied, 502 U.S. 863, 112 S.Ct. 185, 116 L.Ed.2d 146 (1991). Thus, an agreement wherein a hospital agrees not to fully disclose truthful and pertinent information about a physician to a peer review organization would violate the public policy in favor of full disclosure. Conversely, an agreement by a hospital not to disclose information about a physician which is known to be false would not violate the public policy in favor of full disclosure.¹⁰⁴⁸

¹⁰⁴⁵ *Id.* at Syl. Pt. 2.

¹⁰⁴⁶ 438 S.E.2d 6 (W. Va. 1993).

¹⁰⁴⁷ *Id.* at Syl. Pt. 1.

¹⁰⁴⁸ *Id.* at Syl. Pt. 3.

C. *Health Care Cost Review Authority*

Justice McHugh clarified the duties of the Health Care Cost Review Authority in its determination of applications for certificates of need in the case of *United Hospital Center, Inc. v. Richardson*.¹⁰⁴⁹ The court held initially that

[p]ursuant to *W.Va. Code*, 16-29B-11 [1983], the West Virginia Health Care Cost Review Authority was designated this State's public health planning and development agency, which agency has the responsibility of administering the West Virginia public health certificate of need program, *W.Va. Code*, 16-2D-1 [1977], *et seq.*; in particular, the duties of the planning and development agency include the determination of the completeness of, the review of and the rendering of a final decision upon certificate of need applications for new institutional health services.¹⁰⁵⁰

The court in *Richardson* next held that

[w]here an applicant sought a certificate of need under the provisions of *W.Va. Code*, 16-2D-1 [1977], *et seq.*, for the acquisition of a medical diagnostic service known as a mobile magnetic resonance imaging ["MRI"] unit, the West Virginia public health planning and development agency was required pursuant to *W.Va. Code*, 16-2D-7(f) [1981], to determine the completeness of the applicant's application within fifteen days of the agency's receipt of the application, and the action of the agency in imposing a "moratorium" upon the determination of completeness of that, and similar, applications, in order that standards for the processing of "MRI" applications could be developed, was arbitrary and capricious, in view of existing statutes and legislative rules allowing opportunity for the development of "MRI" standards during the agency's regular review process.¹⁰⁵¹

D. *Division of Environmental Protection*

In *Ooten v. Faerber*,¹⁰⁵² Justice McHugh held:

Where consideration of the reinstatement of an area deleted from a surface-mining permit is conditioned upon (1) completion of

¹⁰⁴⁹ 328 S.E.2d 195 (W. Va. 1985).

¹⁰⁵⁰ *Id.* at Syl. Pt. 1.

¹⁰⁵¹ *Id.* at Syl. Pt. 2 (alteration in original).

¹⁰⁵² 383 S.E.2d 774 (W. Va. 1989).

mining and reclamation on a significant portion of the approved area and upon (2) a further determination of the possible effect of mining on the deleted area, there must be compliance with both of these conditions, including revegetation, prior to reinstatement, unless the permit conditions are modified in accordance with the statute.¹⁰⁵³

Justice McHugh said in *State ex rel. Laurel Mountain/Fellowsville Area Clean Watershed Ass'n v. Callaghan*¹⁰⁵⁴ that “[w]hen the language of a regulation promulgated pursuant to the West Virginia Surface Mining and Reclamation Act, W.Va. Code, 22A-3-1 et seq., is clear and unambiguous, the plain meaning of the regulation is to be accepted and followed without resorting to the rules of interpretation or construction.”¹⁰⁵⁵ The court ruled that “[p]ursuant to 38 C.S.R. Sec. 2-12.4(c) (1991), the Commissioner of the Division of Environmental Protection has a duty to utilize the proceeds from forfeited bonds to accomplish the completion of reclamation of affected lands of a surface mine.”¹⁰⁵⁶

In *Curnutte v. Callaghan*,¹⁰⁵⁷ Justice McHugh stated that “[u]nder the definition of valid existing rights for haul roads provided in 38 W.Va.C.S.R. Sec. 2-2.129 (1992), a permit applicant may establish valid existing rights for a coal haul road if the applicant demonstrates that the proposed road was in existence prior to August 3, 1977.”¹⁰⁵⁸

In the case of *State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection*,¹⁰⁵⁹ Justice McHugh wrote that

[p]ursuant to W.Va. Code, 22A-3-11(g) [1990] and 38 W.Va.C.S.R. Sec. 2-12.4(d) (1991), the West Virginia Division of Environmental Protection has a mandatory, nondiscretionary duty to utilize moneys from the Special Reclamation Fund, up to [twenty-five percent] of the annual amount, to treat acid mine drainage at bond forfeiture sites when the proceeds from forfeited bonds are less than the actual cost of reclamation. However, when the cost of treating acid mine drainage at these sites is greater than the amount of funds available in the Special Reclamation Fund, the Division of Environmental Protection may expend the available funds in the Special Reclamation Fund at the highest

¹⁰⁵³ *Id.* at Syl. Pt. 2.

¹⁰⁵⁴ 418 S.E.2d 580 (W. Va. 1992).

¹⁰⁵⁵ *Id.* at Syl. Pt. 1.

¹⁰⁵⁶ *Id.* at Syl. Pt. 2.

¹⁰⁵⁷ 425 S.E.2d 170 (W. Va. 1992).

¹⁰⁵⁸ *Id.* at Syl. Pt. 1.

¹⁰⁵⁹ 447 S.E.2d 920 (W. Va. 1994).

priority sites.¹⁰⁶⁰

Justice McHugh wrote in *State ex rel. East End Ass'n v. McCoy*¹⁰⁶¹ that

[u]nder *W.Va. Code*, 22-15-10(b) [1994], it is unlawful for any person, unless the person holds a valid permit from the division of environmental protection to install, establish, construct, modify, operate or abandon any solid waste facility. All approved solid waste facilities shall be installed, established, constructed, modified, operated or abandoned in accordance with this article, plans, specifications, orders, instructions and rules in effect. A person who obtains a construction permit from the Division of Environmental Protection under *W.Va. Code*, 22-5-11 [1994] of the West Virginia Air Pollution Control Act to construct a medical waste incinerator is not required to also obtain a construction permit for that purpose under *W.Va. Code*, 22-15-10(b) [1994].¹⁰⁶²

In *West Virginia Division of Environmental Protection v. Kingwood Coal Co.*,¹⁰⁶³ Justice McHugh stated that “[a]ppeals of a final agency decision issued by the director of the division of environmental protection shall be heard de novo by the surface mine board as required by *W.Va. Code*, 22B-1-7(e) [1994]. The board is not required to afford any deference to the DEP decision but shall act independently on the evidence before it.”¹⁰⁶⁴

E. Division of Personnel

Justice McHugh restricted the authority of the Division of Personnel in grievance proceedings in the case of *Parsons v. West Virginia Bureau of Employment Programs, Workers' Compensation Division*.¹⁰⁶⁵ The court initially stated that “[t]he Division of Personnel has no jurisdiction to hear or decide misclassification grievances at level three of the Grievance Procedure for State Employees set forth in *W.Va. Code*, 29-6A-1, *et seq.*, except in those instances where the Division of Personnel is the employing agency.”¹⁰⁶⁶ The court next held that

[t]he legislature has statutorily mandated that the Division of

¹⁰⁶⁰ *Id.* at Syl.

¹⁰⁶¹ 481 S.E.2d 764 (W. Va. 1996).

¹⁰⁶² *Id.* at Syl. Pt. 3.

¹⁰⁶³ 490 S.E.2d 823 (W. Va. 1997).

¹⁰⁶⁴ *Id.* at Syl. Pt. 2.

¹⁰⁶⁵ 428 S.E.2d 528 (W. Va. 1993).

¹⁰⁶⁶ *Id.* at Syl. Pt. 1.

Personnel has the discretion of becoming a party at level three of the Grievance Procedure for State Employees, and as a party at level three of the grievance procedure the consent of the Division of Personnel is needed before the relief requested can be modified under *W.Va. Code*, 29-6A-3(k) [1988].¹⁰⁶⁷

F. Department of Health and Human Resources

Justice McHugh addressed the protocol for working with infectious medical waste in *State ex rel. East End Ass'n v. McCoy*.¹⁰⁶⁸ He said that

[u]nder *W.Va. Code*, 20-5J-5(b) [1991] and 64 C.S.R. 56-4.1 [1993] no person may own, construct, modify, operate or close an infectious medical waste management facility without first obtaining a permit from the secretary of the Department of Health and Human Resources. According to 64 C.S.R. 56-4.4.4 [1993], an infectious medical waste management facility permit application must include, among other information, a proposed infectious medical waste management plan. The secretary of the Department of Health and Human Resources must approve this plan before he or she grants a permit to own, construct, modify, operate or close an infectious medical waste management facility.¹⁰⁶⁹

The court next held that

[u]nder *W.Va. Code*, 20-5J-6(a)(9) [1994], the secretary of the Department of Health and Human Resources shall promulgate legislative rules in accordance with the provisions of *W.Va. Code*, 29A-1-1, *et seq.* necessary to effectuate the findings and purposes of the West Virginia Medical Waste Act, *W.Va. Code*, 20-5J-1, *et seq.* These rules shall include, but not be limited to, procedures for public participation in the implementation of this article. *W.Va. Code*, 20-5J-6(a)(9) [1994] requires the secretary of the Department of Health and Human Resources to promulgate legislative rules setting forth procedures for public participation in the permit application process of noncommercial infectious medical waste management facilities.¹⁰⁷⁰

¹⁰⁶⁷ *Id.* at Syl. Pt. 2.

¹⁰⁶⁸ 481 S.E.2d 764 (W. Va. 1996).

¹⁰⁶⁹ *Id.* at Syl. Pt. 4.

¹⁰⁷⁰ *Id.* at Syl. Pt. 5.

G. *Division of Human Services*

Justice McHugh addressed an aspect of the method used by, what is now the division of human services, in determining food stamp eligibility in the case of *Bragg v. Ginsberg*.¹⁰⁷¹ The court held:

In establishing the value of a licensed vehicle of a household as a financial resource in determining whether the household's financial resources, or assets, exceeded the limits of eligibility for food stamps under the federal Food Stamp Act of 1977, 7 U.S.C. Sec. 2011 [1977], et seq., for which food stamps the household applied in May, 1977, the West Virginia Department of Human Services (then the "West Virginia Department of Welfare") was required, pursuant to 7 U.S.C. Sec. 2014(g) [1977], and applicable federal and state regulations, to determine the "fair market value" of the motor vehicle, and that fair market value was to be determined by the West Virginia Department of Human Services by assigning to the vehicle the vehicle's "wholesale value."¹⁰⁷²

H. *Division of Health*

In *Citizens Concerned About Valley Mental Health Center v. Hansbarger*,¹⁰⁷³ Justice McHugh clarified the authority of what is now the Division of Health and the Board of Health. The court noted initially that "[t]he West Virginia Department of Health through its Board of Health and Director has a duty to insure the effective delivery of mental health services in this State."¹⁰⁷⁴ Justice McHugh held next that

[t]he discretion of the board of directors of comprehensive community mental health-mental retardation centers, such as Valley Comprehensive Community Mental Health Center, to determine the nature of mental health services which such centers provide to the communities they serve is circumscribed by guidelines and standards established by the State of West Virginia and, in particular, by the West Virginia Department of Health; those guidelines and standards are reflected (1) in the provisions of *W.Va. Code*, 27-2A-1 [1977], which statute enumerates various requirements for the licensure of comprehensive community mental health-mental retardation centers, (2) in the rules and regulations relating to such centers promulgated by the Board of

¹⁰⁷¹ 314 S.E.2d 865 (W. Va. 1984).

¹⁰⁷² *Id.* at Syl.

¹⁰⁷³ 309 S.E.2d 17 (W. Va. 1983).

¹⁰⁷⁴ *Id.* at Syl. Pt. 1.

Health of the West Virginia Department of Health and (3) in other matters, including lease and service contract agreements between the State of West Virginia and comprehensive community mental health-mental retardation centers and state monitoring or evaluation of such centers.¹⁰⁷⁵

The court in *Hansbarger* concluded by stating:

The Director of the West Virginia Department of Health has the power by statute to enforce the rules and regulations promulgated by the Board of Health, and the Director of the West Virginia Department of Health and certain others have the power by statute to hold investigations, inquiries and hearings concerning matters covered by the laws of this State pertaining to public health and within the authority of the Board of Health, and the rules, regulations and orders of the Board.¹⁰⁷⁶

I. Department of Education

That court held in *State ex rel. Wilson v. Truby*¹⁰⁷⁷ that “[p]ursuant to Part III of the West Virginia Department of Education Employee Handbook, applicants within the Department who have met the objective eligibility criteria for a vacant professional position are entitled to an interview for such position.”¹⁰⁷⁸

Justice McHugh examined implementation of *A Master Plan for Public Education* in *Pauley v. Bailey*.¹⁰⁷⁹ The court initially held that

[t]he West Virginia Board of Education and the State Superintendent of Schools, pursuant to their general supervisory powers over education in West Virginia under W.Va. Const. art. XII, Sec. 2, and their specific duties to establish, implement and enforce high quality educational standards for all facets of education under the provisions of Chapter 18 of the West Virginia Code, have a duty to ensure the complete executive delivery and maintenance of a “thorough and efficient system of free schools” in West Virginia as that system is embodied in *A Master Plan for Public Education* which plan was proposed by agencies of the executive branch and found constitutionally acceptable by the Circuit Court of Kanawha County and that plan will be enforced until such time as it is altered or modified by this Court or the

¹⁰⁷⁵ *Id.* at Syl. Pt. 2.

¹⁰⁷⁶ *Id.* at Syl. Pt. 3.

¹⁰⁷⁷ 281 S.E.2d 231 (W. Va. 1981).

¹⁰⁷⁸ *Id.* at Syl. Pt. 3.

¹⁰⁷⁹ 324 S.E.2d 128 (W. Va. 1984).

circuit court.¹⁰⁸⁰

The court in *Pauley* then held:

Board Policies Secs. 2510 and 2321 of the West Virginia Board of Education, standing alone, do not comply with the statutory duty of the West Virginia Board of Education, under *W.Va. Code*, 18-9A-22 [1981], to establish quality educational standards for the operation of the county school systems in West Virginia, nor will such policies comply with the duty of the West Virginia Board of Education, under the 1984 amended version of that statute, to establish “high quality” educational standards for the operation of the county school systems in West Virginia as such standards are detailed in A Master Plan for Public Education.¹⁰⁸¹

In *Miller v. Board of Education of County of Boone*,¹⁰⁸² Justice McHugh stated that “*W.Va. Code*, 18A-2-8a [1977] does not require the board of education or superintendent to take some affirmative action before the first Monday in May when not rehiring probationary employees.”¹⁰⁸³

J. *Department of Motor Vehicles*

The court in *Wells v. Roberts*¹⁰⁸⁴ looked at the issue of mandatory revocation of a driver’s license. Justice McHugh indicated initially that “[m]andatory administrative revocation of an operator’s license, without an administrative hearing, under *W.Va. Code*, 17B-3-5, where there has been a prior hearing and conviction on the underlying criminal charge, does not deny the person whose license is so revoked due process of law.”¹⁰⁸⁵ The court in *Wells* then held:

W.Va. Code, 17B-3-5, provides for a mandatory revocation of an operator’s license upon receipt of a record of conviction of a specified offense when that conviction has become final. That section does not provide for an administrative hearing either before or after the revocation, but, rather, for “forthwith” revocation. *W.Va. Code*, 17B-3-6, on the other hand, provides for discretionary suspension of an operator’s license where there is evidence that the licensee has committed a specified offense. That

¹⁰⁸⁰ *Id.* at Syl. Pt. 1.

¹⁰⁸¹ *Id.* at Syl. Pt. 2.

¹⁰⁸² 437 S.E.2d 591 (W. Va. 1993).

¹⁰⁸³ *Id.* at Syl. Pt. 6.

¹⁰⁸⁴ 280 S.E.2d 266 (W. Va. 1981).

¹⁰⁸⁵ *Id.* at Syl. Pt. 2.

section does provide for an administrative hearing upon request after which the suspension may be rescinded, extended or changed to a revocation.¹⁰⁸⁶

The court addressed the degree of evidence necessary in a license suspension hearing in *Ours v. West Virginia Department of Motor Vehicles*.¹⁰⁸⁷ Justice McHugh held that

[r]eports prepared by a police officer investigating an automobile accident and reports prepared by persons involved in such accident may not be the sole evidence upon which the Commissioner of the Department of Motor Vehicles bases a determination, after a suspension hearing conducted pursuant to *W.Va. Code*, 17D-3-15 [1972], that there is a “reasonable possibility of judgment” against a driver or owner of a vehicle involved in the accident and from whom security for that accident has been required pursuant to the provisions of chapter 17D, article 3 of the West Virginia Code.¹⁰⁸⁸

In *Kimes v. Bechtold*,¹⁰⁸⁹ Justice McHugh held that “*W.Va. Code*, 17C-5A-3 [1983], read in pari materia with *W.Va. Code*, 17C-5-7 [1983], does not authorize the early reissuance of a license to operate a motor vehicle, after the successful completion of an alcoholism educational, treatment or rehabilitation program, where the license had been revoked for a first refusal to submit to a designated secondary chemical test.”¹⁰⁹⁰

K. Board of Optometry

Justice McHugh addressed several issues involving the state board of optometry in the case of *Serian v. State By & Through West Virginia Board of Optometry*.¹⁰⁹¹ The first issue concerned the power of the board to act when all its members were not appointed. Justice McHugh wrote:

Where appointments of lay persons by the governor of this State to the West Virginia Board of Optometry pursuant to *W.Va. Code*, 30-1-4a [1977], had not been made, the West Virginia Board of Optometry, nevertheless, had jurisdiction to conduct license

¹⁰⁸⁶ *Id.* at Syl. Pt. 1.

¹⁰⁸⁷ 315 S.E.2d 634 (W. Va. 1984).

¹⁰⁸⁸ *Id.* at Syl. Pt. 1.

¹⁰⁸⁹ 342 S.E.2d 147 (W. Va. 1986).

¹⁰⁹⁰ *Id.* at Syl. Pt. 2.

¹⁰⁹¹ 297 S.E.2d 889 (W. Va. 1982).

revocation proceedings against an optometrist practicing in this State, where the record indicated that, pursuant to *W.Va. Code*, 30-1-5 [1931], a quorum of board members existed during the transaction of business relating to such revocation proceedings.¹⁰⁹²

The next issue the court resolved in *Serian* concerned the board of optometry's adherence to a specific notice requirement in its rules and regulations. Justice McHugh held that

[w]here the rules and regulations of the West Virginia Board of Optometry required that an optometrist charged with a violation of the optometry laws of this State be provided in writing with a list of persons, if any, who witnessed the alleged violation, such rules and regulations were complied with by the West Virginia Board of Optometry, where the written notices of hearing before the board upon the violation provided the names of persons who complained against the optometrist concerning the violation, and the testimony of other persons against the optometrist whose names were not provided in the notices or in any other document prior to the hearing was not considered by the board.¹⁰⁹³

Justice McHugh continued in *Serian* by addressing the presumptive impartiality of practicing optometrist to be members of the board of optometry. The court stated that

[t]he fact that members of the West Virginia Board of Optometry or members of board committees are practicing optometry in this State does not ordinarily suggest that such board or committee members have a pecuniary interest of sufficient substance to disqualify them from participating in license revocation proceedings against an optometrist also practicing in this State.¹⁰⁹⁴

The final matter taken up by Justice McHugh in *Serian* involved the interchange of roles by members of the board of optometry. The court stated:

License revocation proceedings before the West Virginia Board of Optometry, wherein charges filed against an optometrist practicing in this State were investigated, heard and evaluated before the board and its appointed committee, did not violate due process per se through the alleged mixing of the roles of

¹⁰⁹² *Id.* at Syl. Pt. 1.

¹⁰⁹³ *Id.* at Syl. Pt. 2.

¹⁰⁹⁴ *Id.* at Syl. Pt. 3.

complainant or prosecutor and judge.¹⁰⁹⁵

L. Public Service Commission

In *West Virginia-Citizen Action Group v. Public Service Commission of West Virginia*,¹⁰⁹⁶ Justice McHugh addressed several matters involving the authority of the Public Service Commission. The court initially held that “[t]he Public Service Commission was created by the Legislature for the purpose of exercising regulatory authority over public utilities. Its function is to require such entities to perform in a manner designed to safeguard the interests of the public and the utilities. Its primary purpose is to serve the interests of the public.”¹⁰⁹⁷ The court next examined the authority of the Public Service Commission regarding a specific issue. It was stated that

[w]here a public utility communicates, through its billing process, with its customers upon matters concerning the costs customers must bear if certain legislation concerning utilities is enacted into law, the Public Service Commission of West Virginia has jurisdiction under its authority to (1) safeguard the interests of the public, and (2) regulate the “practices, services and rates of public utilities,” to establish methods by which the utility’s customers may receive contrasting or opposing viewpoints concerning such costs.¹⁰⁹⁸

Justice McHugh in *Citizen Action Group* concluded that

[w]here a public utility placed in its monthly billing envelopes mailed to its customers an insert which stated that electric bills will “increase sharply” if certain legislation before the United States Congress, concerning utilities, is enacted into law, the Public Service Commission of West Virginia had jurisdiction to require that a subsequent mailing of the utility’s billing envelopes contain the insert of an appropriate spokesman, setting forth contrasting or opposing viewpoints to the utility’s insert.¹⁰⁹⁹

In *Stephens v. Public Service Commission of West Virginia*,¹¹⁰⁰ Justice McHugh addressed a common carrier’s efforts to obtain lawful authority to operate

¹⁰⁹⁵ *Id.* at Syl. Pt. 4.

¹⁰⁹⁶ 330 S.E.2d 849 (W. Va. 1985).

¹⁰⁹⁷ *Id.* at Syl. Pt. 1.

¹⁰⁹⁸ *Id.* at Syl. Pt. 2.

¹⁰⁹⁹ *Id.* at Syl. Pt. 3.

¹¹⁰⁰ 356 S.E.2d 191 (W. Va. 1987).

in the state, after having previously operated unlawfully in the state. The court held that

[i]f a common carrier by motor vehicle willfully operates unlawfully within this State by not first having applied for and obtained a certificate of convenience and necessity pursuant to *W.Va. Code*, 24A-2-5 [1980], and that common carrier subsequently applies for a certificate, the Public Service Commission may not base its findings that the public convenience and necessity require the proposed service or any part thereof on evidence relating to such unlawful operations.¹¹⁰¹

Justice McHugh held in *Blennerhassett Historical Park Commission v. Public Service Commission of West Virginia*¹¹⁰² that “[t]he river transportation service on the Ohio River from Point Park in Parkersburg, West Virginia to Blennerhassett Island is a ferry service and, pursuant to *W.Va. Code*, 24-2-1 [1983], is a public utility subject to the regulatory jurisdiction of the Public Service Commission.”¹¹⁰³

In *Consumer Advocate Division of Public Service Commission of West Virginia v. Public Service Commission of West Virginia*,¹¹⁰⁴ Justice McHugh addressed the ability of the Public Service Commission to alter laws. The court held that “[a] statute, or an administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.”¹¹⁰⁵ Justice McHugh ruled that

[w]here a rule of the Public Service Commission of West Virginia authorizes a waiver of such rule in the event that a provision of the rule would result in “undue hardship,” this Court, upon appeal from a final order of the Commission waiving such rule due to “hardship,” will remand the case for the Commission to follow its rule by finding whether an “undue hardship” would result from application of the rule.¹¹⁰⁶

Justice McHugh examined the authority of the Public Service Commission to grant certificates to radio carriers in the case of *Capitol Radiotelephone Co. v. Public Service Commission of West Virginia*.¹¹⁰⁷ He stated the following:

¹¹⁰¹ *Id.* at Syl.

¹¹⁰² 366 S.E.2d 758 (W. Va. 1988).

¹¹⁰³ *Id.* at Syl.

¹¹⁰⁴ 386 S.E.2d 650 (W. Va. 1989).

¹¹⁰⁵ *Id.* at Syl. Pt. 1.

¹¹⁰⁶ *Id.* at Syl. Pt. 2.

¹¹⁰⁷ 404 S.E.2d 528 (W. Va. 1991).

In a case where a radio common carrier seeks a certificate of public convenience and necessity pursuant to the provisions of *W.Va. Code*, 24-2-11 [1983], the Public Service Commission must place the burden of proof upon the applicant in establishing that public convenience and necessity do exist. However, the Public Service Commission is not required to consider the effect of granting such certificate on existing radio common carriers. When such public convenience and necessity is properly shown, it is not error for the Public Service Commission to grant a certificate of public convenience and necessity.¹¹⁰⁸

The issue confronting Justice McHugh in *Casey v. Public Service Commission of West Virginia*¹¹⁰⁹ involved the authority of the Public Service Commission to intervene in interstate telephone billing disputes. The court held:

Where a billing dispute arises between an interstate telephone company and a customer concerning interstate telephone calls, which interstate calls are regulated by the Federal Communications Commission, and the Federal Communications Commission has an on-going procedure for the resolution of such disputes, the Communications Act of 1934, set forth in 47 U.S.C. Sec. 151, et seq., preempts the jurisdiction of the Public Service Commission of West Virginia to resolve such interstate telephone billing disputes, even though the Federal Communications Commission deferred to the states the determination of whether and under what circumstances local exchange carriers will be allowed to offer disconnection for nonpayment services to the interstate telephone company.¹¹¹⁰

Justice McHugh wrote in *City of Kenova v. Bell Atlantic-West Virginia, Inc.*¹¹¹¹ that

[i]n the event that a conflict arises between county commissions, between telephone companies, between a telephone company or companies and a county commission or commissions, or between the department of public safety and any of the foregoing entities concerning an emergency telephone system or systems or an enhanced emergency telephone system or systems, the public service commission, upon application by such county commission, telephone company, or department of public safety,

¹¹⁰⁸ *Id.* at Syl. Pt. 2.

¹¹⁰⁹ 457 S.E.2d 543 (W. Va. 1995).

¹¹¹⁰ *Id.* at Syl. Pt. 3.

¹¹¹¹ 473 S.E.2d 141 (W. Va. 1996).

shall resolve such conflict, pursuant to *W.Va. Code*, § 24-6-7 [1989]. However, neither *W.Va. Code*, 24-6-7 [1989] nor *W.Va. Code*, 24-6-1a [1988] authorizes the public service commission to resolve conflicts which arise between a county commission and a municipality concerning an emergency telephone system or systems or an enhanced emergency telephone system or systems.¹¹¹²

The court concluded in *Kenova* that

[u]nder the plain language of *W.Va. Code*, 24-6-5 [1989], an enhanced emergency telephone system, at a minimum, shall provide, inter alia, that all the territory in the county, including every municipal corporation in the county, which is served by telephone company central office equipment that will permit such a system to be established shall be included in the system.¹¹¹³

In *Jackson v. Donahue*,¹¹¹⁴ Justice McHugh addressed issues involving self-insured foreign commercial trucking companies. The court noted that “[t]he phrase ‘self-insurance’ means, generally, the assumption of one’s own risk and, typically, involves the setting aside of a special fund to meet losses and pay valid claims, instead of insuring against such losses and claims through an insurance policy.”¹¹¹⁵ The court then stated that

[u]nder the law of this State, a foreign commercial trucking corporation, which has been granted authority by the West Virginia Public Service Commission to self-insure under *W.Va. Code*, 24A-5-5(g) [1961], must afford, as a self-insurer, the same coverage under the West Virginia motor vehicle omnibus clause statutes, *W.Va. Code*, 33-6-31(a) [1982], and *W.Va. Code*, 17D-4-12(b)(2) [1991], for the protection of the public, as would a liability insurance contract.¹¹¹⁶

Justice McHugh concluded in *Jackson* that

[a] foreign commercial trucking corporation operating in interstate commerce pursuant to a federal regulatory scheme, which provides federal minimum limits of liability coverage, is not

¹¹¹² *Id.* at Syl. Pt. 2.

¹¹¹³ *Id.* at Syl. Pt. 4.

¹¹¹⁴ 457 S.E.2d 524 (W. Va. 1995).

¹¹¹⁵ *Id.* at Syl. Pt. 1.

¹¹¹⁶ *Id.* at Syl. Pt. 2.

subject to the limits set forth in *W.Va. Code*, 17D-4-2 [1979], concerning this State's financial responsibility provisions, even though the corporation was granted authority to self-insure by the West Virginia Public Service Commission.¹¹¹⁷

M. Police Civil Service Commission

*Martin v. Pugh*¹¹¹⁸ required Justice McHugh to address several issues concerning appointment of police officers under the Police Civil Service Act. It was held initially that "*W.Va. Code*, 8-14-15 [1969], requires an average score to be calculated and utilized for each candidate who takes the competitive examination for a police civil service position on more than one occasion during the three years next preceding the date of the prospective appointment."¹¹¹⁹ Justice McHugh next held that "[t]he burden of proof is upon a candidate for appointment to a police civil service position to show that other candidates having higher average examination scores are no longer available for appointment for one or more of the reasons set forth in *W.Va. Code*, 8-14-14 and -15 [1969]."¹¹²⁰ In *Martin*, the court then ruled that "[t]here must be strict compliance with the Police Civil Service Act, *W.Va. Code*, 8-14-6 to -23, and de facto appointments, based upon mere performance of duties as a police officer, are not contemplated under such Act."¹¹²¹ Justice McHugh concluded in *Martin* that

[w]here a candidate for appointment to a police civil service position does not satisfy the requirements of *W.Va. Code*, 8-14-15 [1969] for inclusion in the list of certified eligibles, is not so certified by the policemen's civil service commission, and is not selected by the appointing officer from such list, his purported "appointment" in any other manner is void ab initio, and the municipality is not estopped from subsequently resisting his efforts to obtain recognition of his status pursuant to the void appointment.¹¹²²

Justice McHugh clarified the weight to be accorded statutory criteria for promotion within the ranks of police departments in the case of *Bays v. Police Civil Service Commission, City of Charleston*.¹¹²³ The court stated:

¹¹¹⁷ *Id.* at Syl. Pt. 3.

¹¹¹⁸ 334 S.E.2d 633 (W. Va. 1985).

¹¹¹⁹ *Id.* at Syl. Pt. 2.

¹¹²⁰ *Id.* at Syl. Pt. 3.

¹¹²¹ *Id.* at Syl. Pt. 4.

¹¹²² *Id.* at Syl. Pt. 5.

¹¹²³ 364 S.E.2d 547 (W. Va. 1987).

The Police Civil Service Act, in particular, *W.Va. Code*, 8-14-17, as amended, requires that the promotions of individuals thereunder are to be based upon merit and fitness to be ascertained by competitive written examination and upon the superior qualifications of the individuals promoted, as shown by their previous service and experience. One of these test factors, in itself, is not an adequate determinant of the applicant's merit and fitness; therefore, it should not be considered to the exclusion of the others. Accordingly, regulations of a police civil service commission which conflict with the statute on this point are void.¹¹²⁴

Justice McHugh scrutinized questionable promotional criteria in the case of *Habursky v. Recht*.¹¹²⁵ The court stated that

[a] rule of a police civil service commission basing seniority points, for the purpose of promotion, upon "years of in-grade service" is invalid, as it is too restrictive and conflicts with *W.Va. Code*, 8-14-17, as amended, which requires consideration of "previous service and experience." An "in-grade" service credit rule is invalid also when it conflicts with an existing, city-approved regulation of a police civil service commission which requires consideration of "years of service."¹¹²⁶

Justice McHugh observed in *Mason v. City of Welch*¹¹²⁷ that "[p]arking-meter attendants are not 'members of a paid police department' as defined in *W.Va. Code*, 8-14-6 [1969] and are, therefore, not covered by the Police Civil Service Act, *W.Va. Code*, 8-14-6 to -23, as amended."¹¹²⁸

Justice McHugh held in *Echard v. City of Parkersburg*¹¹²⁹ that "[e]ntry of an order by a policemen's civil service commission takes place when entered in an order book of the policemen's civil service commission and dated by the recorder of the city."¹¹³⁰

N. *Division of Water Resources*

In Rayle Coal Co. v. Chief, Division of Water Resources, State Department

¹¹²⁴ *Id.* at Syl. Pt. 2.

¹¹²⁵ 375 S.E.2d 760 (W. Va. 1988).

¹¹²⁶ *Id.* at Syl. Pt. 1.

¹¹²⁷ 375 S.E.2d 572 (W. Va. 1988).

¹¹²⁸ *Id.* at Syl.

¹¹²⁹ 419 S.E.2d 14 (W. Va. 1992).

¹¹³⁰ *Id.* at Syl. Pt. 2.

of *Natural Resources*,¹¹³¹ Justice McHugh stated:

According to *W.Va. Code*, 20-5A-5(b), as amended, an application for a water pollution control permit is required whenever there is a discharge of any amount of “pollutant,” treated or untreated, from a “point source” into the “waters” of this state, as these terms are defined in *W.Va. Code*, 20-5A-2, as amended.¹¹³²

The court also held that “[t]he West Virginia Water Pollution Control Act, *W.Va. Code*, 20-5A-1 to 20-5A-24, as amended, requires an application for a permit when the cessation of business operations does not stop the pollution.”¹¹³³

O. *Water Development Authority*

Justice McHugh addressed the ability of the Water Development Authority to impose service charges on public service districts in the case of *State ex rel. Water Development Authority v. Northern Wayne County Public Service District*.¹¹³⁴ The court held:

W.Va. Code, 22C-1-7 [1994] authorizes the Water Development Authority to directly impose on a public service district, which operates a public utility as defined in *W.Va. Code*, 24-1-2 [1979], “in its own name and for its own benefit service charges determined by it to be necessary” when the public service district defaults on a loan made by the Water Development Authority to the public service district. However, the Water Development Authority’s power to impose such service charges upon the public service district which operates a public utility is subject to the regulatory review and approval of the Public Service Commission pursuant to *W.Va. Code*, 24-2-1 [1991].¹¹³⁵

P. *Division of Natural Resources*

In *State ex rel. Hamrick v. LCS Services, Inc.*,¹¹³⁶ Justice McHugh commented upon the right of the Division of Natural Resources to litigate a matter in state court that evolved out of a federal proceeding. The court held initially:

¹¹³¹ 401 S.E.2d 682 (W. Va. 1990).

¹¹³² *Id.* at Syl. Pt. 1.

¹¹³³ *Id.* at Syl. Pt. 2.

¹¹³⁴ 464 S.E.2d 777 (W. Va. 1995).

¹¹³⁵ *Id.* at Syl. Pt. 5.

¹¹³⁶ 414 S.E.2d 620 (W. Va. 1992).

When a federal district court orders the state Division of Natural Resources (DNR) to comply with state permit procedures for a solid waste facility which were in effect on February 3, 1988, and which procedures on that date required only a permit from state DNR authorities, but subsequent to that date, the legislature enacts new provisions, *W.Va. Code*, 20-5F-4a, as amended, and *W.Va. Code*, 20-9-12b, as amended, which require a certificate of site approval from county or regional solid waste authorities, the DNR may institute an action in circuit court to adjudicate the issue of compliance with the requirement for a certificate of site approval from county or regional solid waste authorities. Because the issue of the requirement of a certificate of site approval from county or regional solid waste authorities was not litigated in the federal district court, it is error for the circuit court to apply principles of res judicata and collateral estoppel to bar litigation seeking to adjudicate this issue in the circuit court.¹¹³⁷

Justice McHugh then concluded:

When a federal district court orders the state Division of Natural Resources (DNR) to comply with state permit procedures for a solid waste facility which were in effect on February 3, 1988, and which procedures on that date required only a permit from state DNR authorities, but subsequent to that date, the legislature enacts a new provision, *W.Va. Code*, 20-9-12c [1990], which requires approval by a county commission for the continued handling of 10,000 tons or more of solid waste per month, the DNR may institute an action in circuit court to adjudicate the issue of compliance with this requirement. Because the issue of approval by a county commission for the continued handling of 10,000 tons or more of solid waste per month was not litigated in the federal district court, it is error for the circuit court to apply principles of res judicata and collateral estoppel to bar litigation seeking to adjudicate this issue in the circuit court.¹¹³⁸

Q. Solid Waste Authority

Justice McHugh was called upon in *In re Reitter*¹¹³⁹ to address the propriety of certain compensation being given to board members of a solid waste authority. He held:

¹¹³⁷ *Id.* at Syl. Pt. 3.

¹¹³⁸ *Id.* at Syl. Pt. 4.

¹¹³⁹ 424 S.E.2d 251 (W. Va. 1992).

Under *W.Va. Code*, 20-9-3 [1991], members of a solid waste authority shall not receive compensation for their services thereon, except for actual expenses incurred in the discharge of their duties. Therefore, an employer of a member of a solid waste authority may not be reimbursed for the wages and benefits paid to that board member while he or she is performing duties for the solid waste authority during his or her scheduled hours of employment with the employer.¹¹⁴⁰

R. Department of Highways

In *State ex rel. Keene v. Jordan*,¹¹⁴¹ Justice McHugh determined whether department of highway agents could be subject to criminal prosecution for carrying out lawful orders. The court held that

[p]ursuant to *W.Va. Code*, 17-4-1 [1972] the State Commissioner of Highways has exclusive authority and control over state roads. Therefore, a city official may not interfere with the legitimate authority of the State Department of Highways by criminally prosecuting, under a municipal ordinance, a state employee and an employee of a railroad company for closing a railroad crossing which was under the authority and control of the State Department of Highways.¹¹⁴²

S. Board of Medicine

Justice McHugh addressed the issue of discovery during a proceeding before the board of medicine in the case of *State ex rel. Hoover v. Smith*.¹¹⁴³ He held:

Pursuant to the West Virginia Medical Practice Act set forth in *W.Va. Code*, 30-3-1 *et seq.* and the regulations promulgated by the Board of Medicine pursuant to *W.Va. Code*, 30-3-1 *et seq.* found in 11 CSR 1A-1 *et seq.*, discovery depositions are not expressly or implicitly authorized in a disciplinary proceeding before the Board of Medicine. Furthermore, the due process clause found in article III, 10 of the Constitution of West Virginia does not mandate that discovery be accorded to a physician in a disciplinary proceeding unless there are particular circumstances which would make it fundamentally unfair to refuse to allow the physician to conduct

¹¹⁴⁰ *Id.* at Syl.

¹¹⁴¹ 451 S.E.2d 432 (W. Va. 1994).

¹¹⁴² *Id.* at Syl.

¹¹⁴³ 482 S.E.2d 124 (W. Va. 1997).

discovery prior to the hearing in the disciplinary proceeding. In such event the physician may obtain subpoenas for purposes of obtaining pre-hearing discovery depositions.¹¹⁴⁴

T. *Concurrent Jurisdiction*

Justice McHugh addressed matters involving concurrent jurisdiction between courts and administrative agencies in *State ex rel. Bell Atlantic-West Virginia, Inc. v. Ranson*.¹¹⁴⁵ The court held that

[w]here an administrative agency and the courts have concurrent jurisdiction of an issue which requires the agency's special expertise and which extends beyond the conventional experience of judges, the doctrine of primary jurisdiction applies. In such a case, the court should refrain from exercising jurisdiction until after the agency has resolved the issue. The court's decision whether to apply the primary jurisdiction doctrine is reviewed on appeal under an abuse of discretion standard.¹¹⁴⁶

Justice McHugh then stated that

[i]n determining whether to apply the primary jurisdiction doctrine, courts should consider factors such as whether the question at issue is within the conventional experience of judges; whether the question at issue lies peculiarly within the agency's discretion or requires the exercise of agency expertise; whether there exists a danger of inconsistent rulings; and whether a prior application to the agency has been made.¹¹⁴⁷

U. *Judicial Review Under Administrative Procedure Act*

Justice McHugh articulated the standard of review by circuit courts under the Administrative Procedure Act in the case of *Shepherdstown Volunteer Fire Dept. v. State ex rel. State of West Virginia Human Rights Commission*.¹¹⁴⁸ The court held that

[u]pon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the

¹¹⁴⁴ *Id.* at Syl. Pt. 3.

¹¹⁴⁵ 497 S.E.2d 755 (W. Va. 1997).

¹¹⁴⁶ *Id.* at Syl. Pt. 1.

¹¹⁴⁷ *Id.* at Syl. Pt. 2.

¹¹⁴⁸ 309 S.E.2d 342 (W. Va. 1983).

agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: “(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”¹¹⁴⁹

XVII. INSURANCE LAW

A. *Interpreting Policy Language*

In *Helfeldt v. Robinson*,¹¹⁵⁰ Justice McHugh was forced to determine the effect of an exception to exclusion in a liability policy that was voided by other exclusions in the policy. The court held:

Although an exclusion in a comprehensive general automobile and property liability insurance contract contained an exception for “warranty of fitness or quality of the named insured’s products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner,” that exception to the contract’s exclusion provision did not extend insurance coverage to a contractor for the defective construction of a home where the insurance contract contained other exclusions precluding insurance coverage and the insurance contract in question was a liability insurance policy and not a builder’s risk policy.¹¹⁵¹

In *Shamblin v. Nationwide Mutual Insurance Co.*,¹¹⁵² the court held that “[t]he term ‘occurrence’ in a limitation of liability clause within an automobile liability insurance policy refers unmistakably to the resulting event for which the insured becomes liable and not to some antecedent cause(s) of the injury.”¹¹⁵³

1149 *Id.* at Syl. Pt. 2.

1150 290 S.E.2d 896 (W. Va. 1981).

1151 *Id.* at Syl.

1152 332 S.E.2d 639 (W. Va. 1985).

1153 *Id.* at Syl. Pt. 3.